

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

MICHAEL L. McDONALD

Claimant

VS.

FIBERGLASS SYSTEMS, LP

Respondent

AND

PACIFIC EMPLOYERS INS. CO.

Insurance Carrier

Docket No. 1,003,977

ORDER

Respondent and its insurance carrier (respondent) requested review of the August 2, 2006, post-medical Award entered by Special Administrative Law Judge John Nodgaard.

ISSUES

The Special Administrative Law Judge (SALJ) found that in a Post Award Medical Order dated May 13, 2004, Administrative Law Judge (ALJ) Nelsonna Potts Barnes ordered respondent and its insurance carrier to provide medical treatment to claimant by Dr. Gregory Meister, and if Dr. Meister refused to schedule such an appointment, then Dr. Goel was to be the authorized physician. Under that order, treatment was provided to claimant by Dr. Meister's office. In August 2005, Dr. Vickie Smalley, a physician in Dr. Meister's office, recommended a spinal cord stimulator trial. Respondent failed to authorize this treatment. The SALJ found that both Dr. John Estivo and Dr. Paul Stein were of the opinion that claimant's current symptomatology is related to his work injury of October 11, 2001. The SALJ noted that although Dr. Paul Stein was of the opinion that claimant was a poor candidate for a spinal cord stimulator, he did not testify that claimant was not a candidate for a spinal cord stimulator. The SALJ also noted that Dr. Vickie Smalley testified that she would not have made the recommendation for a spinal cord stimulator trial if she did not believe claimant had an opportunity to get relief from his symptoms. The SALJ found that by failing to follow the authorized treating physician's medical treatment plan, respondent effectively denied claimant the necessary medical treatment for his injury. Accordingly, the SALJ ordered respondent to authorize treatment

of claimant with a spinal cord stimulator trial and, if the trial is successful, to authorize a psychological examination. If claimant is cleared following the psychological examination, the SALJ authorized Dr. Meister's office to implant a spinal cord stimulator and/or pump as deemed medically appropriate, with all costs associated with such treatment to be paid by respondent.

Respondent cites K.S.A. 44-510k(a) and contends that claimant failed to demonstrate that it is more probably true than not that the spinal cord stimulator will either cure or relieve the effects of the accidental injury. Respondent also sets out Dr. Stein's requirements for receiving a dorsal column stimulator and states that claimant has failed to demonstrate he is an appropriate candidate for the stimulator under that criteria. Respondent also contends that the claimant failed to show that his pain is related to his work-related injury.

Claimant argues that respondent should not be allowed to overrule treatment recommendations of its own authorized treating physician or to micro manage claimant's treatment, thus preventing claimant from benefitting from his legal entitlement to future medical treatment. Accordingly, claimant requests that the SALJ's post-award medical Award be affirmed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Based upon the record presented to date, the Board makes the following findings of fact and conclusions of law:

Claimant was injured in a work-related accident on October 11, 2001. As a result of the accident, he suffered injuries to his back, right hip, and right leg. Claimant settled his claim with respondent on September 12, 2003, based on a 32 percent permanent partial disability to the body as a whole. All future medical was left open. At the time of the settlement hearing, Dr. John Estivo was claimant's authorized treating physician.

Dr. Estivo released claimant from treatment as being at maximum medical improvement on February 18, 2004. At that time, he recommended that claimant be seen by an anesthesiologist for chronic pain relief. Respondent authorized Dr. Gregory Meister of Kansas Professional Anesthesia & Pain Management Specialists to provide pain management treatment to claimant. On May 13, 2004, ALJ Nelsonna Potts Barnes issued a Post Award Medical Order requiring respondent to provided authorized medical treatment with Dr. Meister within 15 days or, if Dr. Meister refused to schedule an appointment, that Dr. Goel be named as claimant's authorized treating physician.

Claimant testified that he had no other injuries or aggravations to his back or leg since his work-related accident that would have caused his need for the requested spinal cord stimulator. He had previous back surgery in 1995 but was able to return to work and

to also engage in recreational activities such as roller skating and fishing after that surgery. Since his 2001 injury at work, however, he has been in a great deal of pain and his activities have been limited.

Claimant stated that when he went to Dr. Meister's office for treatment, he was not always seen by Dr. Meister, but was seen by several doctors affiliated with that office. One of those doctors was Vickie Smalley, D.O. Dr. Smalley testified that she first saw claimant on July 7, 2005. Claimant had previously been given a course of conservative pain management but was having problems with the side effects of medication and was not getting relief from his pain. When Dr. Smalley examined claimant on July 7, 2005, he complained of pain in his back and both extremities, especially the right. He described pain in his hips, in his right lower extremity down to the knee with occasional tingling sensation. Dr. Smalley described this as radicular symptoms. Dr. Smalley testified that all her notes indicate that claimant's pain was related to his 2001 accident at work.

Dr. Smalley again saw claimant on August 17, 2005. At that time claimant was complaining of sharp pain along the right lateral lower extremity down to the foot. He stated that his low back pain was 30 percent of his discomfort and the right lower extremity was 70 percent of his discomfort. Dr. Smalley stated that spinal stimulators tend to work better than a pump for lower extremity pain. On August 17, 2005, she discussed a spinal cord stimulator with claimant and gave him some information on the procedure.

Dr. Smalley testified that she recommended claimant have a spinal cord stimulator trial. She said that claimant had tried all other noninvasive options with no relief. She opined that claimant is a candidate for a spinal cord stimulator because his pain is radicular. In response to Dr. Stein's suggestion that there was no diagnostic evidence on imaging studies to determine etiology, Dr. Smalley stated that if there had been any such evidence, the pain could have been treated surgically. In response to Dr. Stein's comment that claimant's pain is axial in location, which is not as responsive to spinal cord stimulation as radicular pain, Dr. Smalley stated that claimant did have radicular pain. Dr. Smalley testified that she would not have recommended a spinal cord stimulator if she did not feel it was a reasonable treatment for claimant's pain.

Dr. John Estivo, a board certified orthopedic surgeon, was claimant's authorized treating physician after the 2001 work-related accident. He released claimant as being at maximum medical improvement on February 18, 2004. After that date, he did not see claimant again until January 6, 2006, when he examined claimant relating to his request for approval of a spinal cord stimulator trial. Dr. Estivo testified that because claimant was continuing to have chronic lumbar spine pain, he agreed with Dr. Smalley's recommendation of a spinal cord stimulator. Dr. Estivo's report of January 6, 2006, states in part:

His [claimant's] symptoms have been worse since the 10/11/01 injury. Taking that into consideration if the anesthesiologist is recommending a spinal cord stimulator

then I would agree with that recommendation in an attempt to try to control his pain. The need for a spinal cord stimulator at this time, in my opinion, would be due to the aggravation of preexisting condition, which occurred from the injury of 10/11/01. He was not having the degree of pain that he is experiencing now prior to 10/11/01 and did not require a spinal cord stimulator at that time.¹

Dr. Estivo admitted that he did not follow chronic pain patients in his practice and said he was not offering an opinion as to whether claimant is a candidate for a spinal cord stimulator. He testified that he thought the stimulator trial would be worth trying in an attempt to control claimant's pain. Dr. Estivo said he would defer to an anesthesiologist the decision as to whether claimant would be a candidate for a spinal cord stimulator. Dr. Estivo admitted that he believed that claimant's obesity was a contributing factor to his ongoing complaints.

Claimant was seen on January 23, 2006, by Dr. Paul Stein, a board certified neurosurgeon, at the request of respondent's attorney, primarily to give an opinion on whether claimant would be a candidate for a spinal cord stimulator. Dr. Stein opined that claimant's current symptomatology is related to the work injury of October 11, 2001. However, Dr. Stein believed that claimant was a poor candidate for a spinal cord stimulator, stating:

The best candidate is one who has predominantly radicular pain of a well determined etiology but for which there is no direct treatment remaining. Although the patient has considerable pain, there is no diagnostic evidence on imaging studies to determine the etiology of this symptomatology. A good deal of his pain is axial in location, which is generally not as responsive to dorsal column stimulation as radicular pain.²

Dr. Stein testified that he could not tell where claimant's pain was coming from. He found nothing on claimant's imaging studies or in the examination that led him to a diagnosis of pain. He also believed that claimant complained that the pain was more in the back or in a gray area rather than true radicular pain.

Dr. Stein stated that before a patient is accepted as a candidate for a spinal cord stimulator there must be a good diagnosis to determine that there is pain and why there is pain. The stimulator should not be used where a direct attack on the cause of the pain could eliminate or reduce the pain. He stated that the dorsal column stimulator is more effective for radicular pain than for axial pain or midline back pain. He testified that spinal cord stimulators are reasonable and appropriate under the proper circumstances, however implantation of a stimulator is a technique that should be limited in its use.

¹ Estivo Depo., Ex. 1 at 2.

² Stein Depo., Ex. 2 at 7.

The Workers Compensation Act places the burden of proof upon the claimant to establish the right to an award of compensation and to prove the conditions on which that right depends.³ “Burden of proof” means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party’s position on an issue is more probably true than not true on the basis of the whole record.”⁴

It is the function of the trier of fact to decide which testimony is more accurate and/or credible and to adjust the medical testimony along with the testimony of the claimant and any other testimony that may be relevant to the question of the nature and extent of injury and disability. The trier of fact is not bound by medical evidence presented in the case and has a responsibility of making its own determination.⁵

As both Drs. Stein and Estivo relate claimant’s present symptoms to his 2001 work-related accidental injury with respondent, the Board finds claimant has met his burden of proving that his pain is work related and that respondent should be responsible for his ongoing medical treatment.

As for the appropriateness of a spinal cord stimulator trial and follow-up treatment, the Board is persuaded by the testimony of Dr. Smalley that this is reasonable and medically necessary to help cure or relieve the pain symptoms that result from claimant’s work-related injury. Accordingly, the SALJ’s Award for additional medical treatment should be affirmed.

Any request for additional post-award attorney fees by claimant’s counsel for services rendered in connection with this appeal should be first presented to the ALJ or SALJ for approval.

WHEREFORE, it is the finding, decision and order of the Board that the post-award medical Award of Special Administrative Law Judge John Nodgaard dated August 2, 2006, is affirmed.

IT IS SO ORDERED.

³ K.S.A. 44-501(a).

⁴ K.S.A. 2001 Supp. 44-508(g).

⁵ *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, 817 P.2d 212, rev. denied 249 Kan. 778 (1991).

Dated this _____ day of October, 2006.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Kim R. Martens, Attorney for Claimant
Vince Burnett, Attorney for Respondent and its Insurance Carrier
Nelsonna Potts Barnes, Administrative Law Judge
John Nodgaard, Special Administrative Law Judge